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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/524,678

01/12/2006

Mark Richard Jones

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DOBRUSIN & THENNISCH PC  
29 W LAWRENCE ST  
SUITE 210  
PONTIAC, MI 48342

EXAMINER

HARTMANN, GARY S

ART UNIT

PAPER NUMBER

3671

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/524,678	<b>Applicant(s)</b> JONES, MARK RICHARD	
	<b>Examiner</b> Gary Hartmann	<b>Art Unit</b> 3671	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 01 April 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 33,34,36,40,41,53 and 59-65 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 33,34,36,40,41,53 and 59-65 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 01 April 2008 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 33, 34, 36, 40, 10, 53 and 59-65 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

As amended, claim 33 has changed the functional language into positively recited process steps. This is improper in a product claim. Applicant elected the invention of a product. The manner in which a product is used is beyond the permissible scope of a product claim. The newly recited process steps in claim 33 render this claim indefinite because the claim no longer recites a product only. The claim has been treated as an asphalt surface repair apparatus, in accordance with the originally claimed invention. Process steps in all of the claims have not been further treated on the merits since they are beyond the scopes of the product claims.

The recitation of “is employed” in claim 36 appears to also be a process type recitation. It is unclear how this recitation presents structure which differs from the previously presented structural recitation.

Claims 59 and 65 include positive recitations to the surface to be repaired. The surface to be repaired is not part of the apparatus; therefore, recitations directed thereto are indefinite and have not been further treated on the merits.

With respect to claims 60 and 63, the recitations of “is positioned” and “is used” appear to be process type recitations improperly recited in the product claim. The examiner suggests

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positively reciting structure which enables the processes to occur in order to present definite claims with clear scopes.

Regarding claims 61 and 64, the term “is moved” is a process type recitation improperly placed in a product claim. The examiner suggests replacing “moved” with “movable.” The claims have been treated as --movable--.

Claim 62 recites several elements required in parent claims 33 and 36. Because these recitations recite “a” rather than “the” (“a hot new asphalt source,” for example), it is unclear if applicant intends these to be additional structures or the same structures as recited in parent claim 33. These recitations have been treated as being the same as in claim 33. Additionally, parts iv and vi appear to be redundant, since there is no recitations which differentiate a control system from a controller.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 33, 34, 36, 40, 10, 53 and 59-65 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weaver (U.S. Patent 3,625,489) in view of Wollner et al. (U.S. Patent 3,311,104), Edo (U.S. Patent 4,261,669), Goodhart et al. (U.S. Patent 6,659,684) and either Wiley (U.S. Patent 6,998,010) or Damp et al. (U.S. Patent 4,601,605).

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Weaver discloses an asphalt surface repair apparatus including a vehicle (12), a heater gas source (220), a pivotally mounted heater (30) and an asphalt source (274). Weaver teaches that the heater is that of Wollner, which is an infrared heater using hydrocarbons, but the hydrocarbons are not specified; thereby leaving the choice to one skilled in the art. Edo teaches that it is known to use liquid petroleum gas to fuel an infrared heater (column 4, lines 16-17). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have used liquid petroleum gas as the fuel of Weaver/Wollner in order to obtain the heat as desired. Weaver does not teach the liquid source or dispenser; however, it is common in road repair to use a liquid source dispenser in order to rejuvenate an asphalt surface as desired. For example, Goodhart teaches such a system. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used a liquid source and dispenser in order to optimally repair an asphaltic surface, as taught by Goodhart. Note that because the heater of Weaver is positioned on the rear of the vehicle, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have positioned the liquid source ahead of the heater. Weaver also doesn't teach the sensor. Wiley and Damp each teach adjusting the height based upon sensed temperatures. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used a distance sensor with Weaver in order to control heating by the proximity of the heater to the surface, as taught by Wiley or Damp.

Regarding the heater blanket, Goodhart teaches using a heater blanket. Applicant's material is prior art and the thermal properties are well known to those skilled in the art. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention

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was made to have used a blanket of the material as claimed in order to properly heat the pavement using a durable construction.

Regarding claims 40, 53 and 62, a controller is inherent. Position sensors which turn heaters off when unsafe movements occur are also well known (switches which stop the operation of microwave ovens when the door is opened, for example). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have utilized a position sensor in conjunction with the pivotable heater in order to, for example, prevent the heater from being turned on in the stowed position; thereby increasing safety.

Regarding claim 41 and further regarding claim 62, the cab of the vehicle is sufficient to meet recitations of “a storage compartment.” Note that none of the additional elements are positively recited.

Regarding claims 60 and 63, the examiner takes official notice that it is well known to position a hot material source in proximity to another material to be heated in order to efficiently heat both materials. For this reason, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have positioned the Weaver/Goodhart as claimed.

Regarding claims 61 and 64, several of the parts which suspend the heater of Weaver are broadly within the scope of a “column.”

Claim 36 is rejected under 35 U.S.C. 103(a) as being unpatentable over Weaver/Wollner et al./Edo/Goodhart et al./Wiley as applied above, and further in view of de Bruyne et al. (U.S. Patent 5,088,919).

De Bruyne teaches the claimed material in conjunction with infrared heaters. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have made the blanket of Goodhart et al. from the claimed material in order to obtain a blanket having a durable construction.

### ***Response to Arguments***

Applicant's arguments filed 03 April 2009 have been considered but are moot in view of the new grounds of rejection. As discussed above, the claims as amended are indefinite. Regarding the arguments directed to the KSR decision, the examiner has provided structure and clear motivation for the combinations in the rejections above. It is also noted that in that decision, the Supreme Court stated that one skilled in the art is a person of creativity, not of automation and would be able to fit the teachings of multiple patents together like pieces of a puzzle. Additional references have been added in order to demonstrate that the use of liquid petroleum gas is well known and not patentable subject matter.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after

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the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gary Hartmann whose telephone number is 571-272-6989. The examiner can normally be reached on Tuesday through Friday, 9am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas Will can be reached on 571-272-6998. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Gary Hartmann/  
Primary Examiner, Art Unit 3671